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Breed v. Jones: Double Jeopardy and the Juvenile

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The Fifth Amendment of the United States Constitution provides: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb . . . ." This is better known as the Double Jeopardy Clause which the United States Supreme Court, in *Benton v. Maryland*,[1] made applicable to the states through the Fourteenth Amendment. The protection against being placed in jeopardy twice has generally been provided to defendants in proceedings which are essentially criminal;[2] whether or not a juvenile is entitled to the same protection within the juvenile process is a question which was resolved by the United States Supreme Court in *Breed v. Jones*.[3]

In *Breed*, Gary Steven Jones, a juvenile 17 years of age, had a petition filed against him in the Los Angeles County Juvenile Court, which alleged that, while armed with a deadly weapon, he committed acts which would have constituted the crime of robbery[4] if committed by an adult. The petition further alleged that because of such acts Jones was a person within the purview of California Welfare and Institutions Code Section 602.[5] Subsequently, a detention hearing[6] was held in which Jones was ordered detained pend-

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1. 395 U.S. 784 (1969) [hereinafter cited as Benton].

2. *See* Helverig v. Mitchell, 303 U.S. 391, 398-99 (1938) [hereinafter cited as Mitchell]; United States v. Hess, 317 U.S. 537, 548-49 (1943) [hereinafter cited as Hess].

3. 421 U.S. 519 (1975) [hereinafter cited as Breed].

4. *See* CAL. PENAL CODE § 211 (West 1970) which provides:

> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

5. 421 U.S. at 521. *See* CAL. WELF. & INST'NS CODE § 602 (West Supp. 1975) which provides:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

6. *See* CAL. WELF. & INST'NS CODE § 632 (West 1972) which provides:

> Unless sooner released, a minor taken into custody under the provisions of this article shall be brought before a judge or referee of

ing a jurisdictional hearing[7] on the Section 602 petition. At the jurisdictional hearing, the juvenile court found that the allegations in the petition were true and declared Jones a ward of the court. The court continued the proceedings for a dispositional hearing.[8] Jones was ordered detained during the interim.

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the juvenile court for a hearing (which shall be referred to as a 'detention hearing') to determine whether the minor shall be further detained as soon as possible but in any event before the expiration of the next judicial day after a petition to declare such minor a ward or dependent child has been filed. If the minor is not brought before a judge or referee of the juvenile court within the period prescribed by this section he shall be released from custody.

7. 421 U.S. at 521. The jurisdictional hearing (sometimes referred to as the "adjudicatory hearing") is described in Goldfarb and Little, *1961 California Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedures*, 51 CALIF. L. REV. 421, at 442 (1963), as follows:

> [T]he adjudicatory hearing essentially is a bifurcated hearing. First, the court determines the 'jurisdictional question' of whether the minor is a person described by sections 600, 601, or 602 of the California Welfare and Institutions Code. If the court finds that it has jurisdiction, then it proceeds to a consideration of the proper disposition to be made of the minor.

The jurisdictional hearing is desicribed in CAL. WELF. & INST'NS CODE § 701 (West 1975):

> At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderence of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed 7 days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made.

8. 421 U.S. at 522. *See* CAL. WELF. & INST'NS CODE § 702 (West 1972) which provides:

> After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study report of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained pending such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The

Fifteen days later, the court conducted a hearing in which it indicated its intention to find Jones ". . . 'not . . . amenable to the care, treatment and training program available through the facilities of the juvenile court' under California Welfare and Institutions Code Section 707."[9] Jones's counsel requested a continuance on the ground of surprise. A continuance was granted for one week, at the conclusion of which a fitness hearing[10] was held. At the conclusion of the hearing, the court declared Jones ". . . 'unfit for treatment as a juvenile' . . . ." and bound him over to the criminal court to be prosecuted as an adult.[11]

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court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate.

9. 421 U.S. at 523. *See* Stats. 1961, c. 1616, p. 3485 § 2, *as amended* CAL. WELF. & INST'NS CODE § 707 (West Supp. 1975) which provides:

> At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Sections 780 or 1737.1, the court may make a finding noted in the minutes that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume. In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law. A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

10. "Fitness hearing" is the term sometimes used when referring to a hearing held under CAL. WELF. & INST'NS CODE § 707 (West Supp. 1975). It derives from the terminology in that section which provides:

> [T]he court may make a finding . . . that the minor is not a fit and proper subject to be dealt with under this chapter . . . .

11. 421 U.S. at 524.

Jones stood trial in the adult criminal system and was found ". . . guilty of robbery in the first degree under California Penal Code Section 211(a)[12] and ordered . . . committed to the California Youth Authority."[13] No appeal was taken.

After a few months, a petition for a writ of habeas corpus was filed in the United States District Court for the Central District of California,[14] alleging that the transfer under Section 707 and subsequent trial placed Jones in double jeopardy. The District Court denied the petition,[15] but such denial was reversed by the Federal Court of Appeals.[16] The state then sought review by the United States Supreme Court which granted certiorari.[17]

The issue presented to the Supreme Court for its determination was whether or not a juvenile should be afforded the protection of the Fifth Amendment against twice being "placed in jeopardy" where the juvenile is processed through a jurisdictional hearing in the juvenile system, declared a ward of the court, and subsequently transferred to the adult criminal system where he is tried and convicted for the same offense.

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12. *See* CAL. PENAL CODE § 211(a) (West 1970) which provides:
> All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon and the robbery of any person who is performing his duties as operator of any motor vehicle, streetcar, or trackless trolley used for the transportation of persons for hire, is robbery in the first degree. All other kinds of robbery are of the second degree.

13. 421 U.S. at 525.

14. Jones v. Breed, 343 F. Supp. 690 (C.D. Cal. 1972).

15. *Id.* at 692. The District Court, in denying the petition, reasoned as follows:
> The distinction between the preliminary procedures and hearings provided by California Law for Juveniles and a criminal trial are many and apparent and the effort of petitioner to relate them is unconvincing. However, even assuming jeopardy attached during the preliminary juvenile proceedings, and further assuming all rights constitutionally assured to an adult accused of crime are to be enforced and made available to a juvenile. It is clear that no new jeopardy arose by the juvenile proceedings sending the case to the criminal court. Such transfer neither acquitted nor convicted and could not in any event represent a second trial for the same offense or more than a *continuing jeopardy* for a single offense.

[emphasis supplied]

16. Jones v. Breed, 497 F.2d 1160 (9th Cir. 1974). The Court of Appeals, in concluding that the Fifth Amendment's guarantee of protection against double jeopardy is applicable to juveniles within the juvenile process, made the following statement:
> Applying double jeopardy protection to juvenile proceedings will not impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth. Indeed, basic constitutional guarantees such as that against double jeopardy are so fundamental to our notions of fairness that our refusal to find them applicable to the youth may do irreparable harm to or destroy their confidence in our judicial system. Jones v. Breed, *supra* at 1165.

17. *Breed*, 421 U.S. at 527.

Historically, the establishment of the New York House of Refuge in 1853 and the institution of the juvenile court by the Illinois Legislature in 1899 marked the first two great humanitarian efforts in juvenile reform.[18] The third was initiated by the United States Supreme Court in *In re Gault*.[19] In *Gault*, the Court held that the Due Process Clause of the Fourteenth Amendment of the United States Constitution applied to the juvenile process and, in particular, to the adjudicative stage of determining the delinquency of a juvenile who allegedly is in violation of a criminal statute. The Court specifically afforded juveniles the constitutional guarantees of the right to notice of the charges, the right to counsel, the right to confrontation and cross-examination of witnesses, and the privilege against self-incrimination.[20] However, the Court did not provide juveniles with *all* criminal procedural guarantees which are afforded adults. Despite this fact, the Court affirmatively held that juveniles must be afforded those constitutoinal rights which are necessary to guarantee them "fundamental fairness" within the juvenile process.[21]

What are those constitutional rights and how are they to be determined? The Supreme Court, beginning with *Gault* and with its subsequent decisions in *In re Winship*[22] and *McKiever v. Pennsylvania*,[23] developed an approach to resolving such questions.

In re Winship presented the Court with the question of whether or not ". . . juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when charged with violation of a criminal law."[24] The Court held that juveniles are constitutionally entitled to proof beyond a reasonable doubt in such a case and expressed the view that its holding would not adversely affect the *unique characteristics* of the juvenile court system:

> Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York policies that a finding that a child has violated a criminal law does *not constitute a criminal convic-*

18. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).
19. 387 U.S. 1 (1967) [hereinafter cited as Gault].
20. *See id.* at 38, 41, 56-57.
21. *Id.* at 13.
22. 397 U.S. 358 (1970) [hereinafter cited as Winship].
23. 402 U.S. 538 (1971) [hereinafter cited as McKiever].
24. 397 U.S. at 365.

> *tion*, that such a finding does not deprive the child of his *civil rights*, and that the juvenile proceedings are *confidential*. Nor will there be any effect on the *informality, flexibility*, or *speed of the hearing* at which the factfinding takes place. And the opportunity during the post adjudicatory or dispositional hearing for a *wide-ranging review* of the child's social history and for his *individualized treatment* will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing.[25] [emphasis added]

In *McKiever v. Pennsylvania*, the Supreme Court considered the question of whether or not a jury trial is constitutionally required in juvenile proceedings in order to preserve "fundamental fairness" to the juvenile within the juvenile process. The Court concluded that ". . . if the jury trial were to be injected into the system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."[26] The Court held that a jury trial was not a constitutional right necessary to preserve fundamental fairness to juveniles within the juvenile process.

A close analysis of the *Gault, Winship* and *McKiever* opinions reveals that the Court has developed a three-prong approach in determining what constitutional rights are necessary to guarantee juveniles "fundamental fairness" within the juvenile process. The Court addresses itself to three basic issues: First, what the underlying purpose of the constitutional right in question is; second, whether that right is required in juvenile proceedings; and third, and most importantly, whether the requirement of the constitutional right in question will detrimentally impede the beneficial aspects of the juvenile system. A factor considered in determining this last issue is the recommendation of various studies and model acts dealing with the juvenile court system indicating the extent to which the right has already been made applicable to delinquency proceedings in the various states, whether by statute or court decision.[27] This same approach appears to be the one applied by the Court in *Breed*.

Citing *Benton v. Maryland*,[28] the Court held that Jones was entitled to full protection against twice being placed in jeopardy after his transfer from the juvenile court, that he was "put in jeopardy" by the proceedings in the adult criminal court and that the ". . .

25. *Id.* at 366.
26. 402 U.S. at 551.
27. Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 226, 275 (1972) [hereinafter cited as *Double Jeopardy in Juvenile Proceedings*].
28. 395 U.S. 784 (1969).

petition filed in juvenile court and the information filed in Superior Court related to the 'same offence' within the meaning of the constitutional prohibition . . . ."[29]

With the facts and the above conclusions established, the Court's basic question for determination was whether or not Jones was "put in jeopardy" by reason of the *jurisdictional hearing* within the juvenile process.[30] If so, then Jones was placed in double jeopardy by reason of his subsequent trial in the adult criminal system; therefore, his case would have to be dismissed. At the foundation of this question was the constitutional issue of whether or not the Fifth Amendment's protection against double jeopardy applies to juveniles within the juvenile process. To determine this question, the Court applied its three-prong approach which it had developed in *Gault*, *Winship* and *McKiever*.

The first question addressed by the Court was: "What is the underlying purpose of the constitutional protection against twice being placed in jeopardy?" In determining this question, the Court relied upon some of its earlier holdings which dealt with the issue of double jeopardy within the adult criminal system. In *Price v. Georgia*,[31] the Court stated:

> The 'twice put in jeopardy' language of the Constitution . . . relates to a potential, i.e., the risk that an accused for the second time will be convicted for the 'same offense' for which he was initially tried.[32]

The Court went on to cite *Green v. United States*,[33] in which it stated, while discussing the purpose behind the Double Jeopardy Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[34]

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29. *Breed*, 421 U.S. at 527.
30. *Id.*
31. 398 U.S. 323 (1970) [hereinafter cited as Price].
32. *Id.* at 326.
33. 355 U.S. 184 (1957) [hereinafter cited as Green].
34. *Id.* at 187.

The Court continued by relying on *United States v. Jorn*,[35] in which case the Court set forth the policy underlying the Double Jeopardy Clause when it stated:

> The Fifth Amendment prohibition against placing a defendant twice in jeopardy represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings.[36]

In summary, it appears that the underlying purpose of the Double Jeopardy Clause, as viewed by the Court, is to prevent the accused from having to undergo the risk of experiencing the physiological trauma, stress, embarrassment and expense of a criminal trial twice for the same offense. The Court seems to qualify such purpose in the name of "finality" in criminal proceedings.

Once having determined the underlying purpose of the Double Jeopardy Clause, the Court directed itself next to the issue of whether or not a juvenile should have a right to such protection within the juvenile process. In addressing this issue, the Court noted that the Double Jeopardy Clause pertains only to proceedings which are essentially criminal;[37] but in so doing, it referred to its holding in *Gault* where, in discussing the Fifth Amendment's privilege against self-incrimination, it stated:

> [J]uvenile proceedings to determine 'delinquency' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings.[38]

The Court continued by implying that because of its holding in *Gault, Winship* and *McKiever*, which implemented the requirement of "fundamental fairness" within the juvenile process, juvenile hearings have been prolonged, and burdens incident to a juvenile's defense have increased.[39] As a result, juvenile proceedings ". . . engender elements of 'anxiety and insecurity' in a juvenile and impose a heavy personal strain."[40] To support this finding, the Court quoted from *Gault*, noting that the label of "delinquency" upon a juvenile carries only slightly less stigma than the term "criminal" as applied to adults, and ". . . where the issue is whether a child will be found to be 'delinquent' and subjected to the loss of his

35. 400 U.S. 470 (1971).
36. *Id.* at 479-480.
37. *Breed*, 421 U.S. at 528, citing Helverig v. Mitchell, 303 U.S. 391, 398-99 (1938); United States v. Hess, 317 U.S. 537, 548-49 (1943).
38. 387 U.S. at 49-50.
39. *Breed*, 421 U.S. at 530.
40. *Id.*, citing *Green*, 355 U.S. at 187.

liberty for years [the gravity] is comparable in seriousness to a felony prosecution."[41] The Court went on to state that ". . . in terms of potential consequences, there is little to distinguish an adjudicatory hearing . . . from a traditional criminal prosecution;"[42] therefore, the right against being placed twice in jeopardy as guaranteed by the Fifth Amendment should be applicable to the juvenile process. The Court held that Jones was put "in jeopardy" at the instance he was ". . . put to trial before the trier of facts, . . . that is, when the juvenile court, as the trier of facts, began to hear evidence."[43]

From the above it appears that the Court found no distinction between the risks and consequences to which a juvenile is exposed during a jurisdictional hearing and those to which an adult is exposed during a criminal trial; it found the same standards of double jeopardy apply equally to juveniles and adults in their respective systems. However, such a holding would require that a juvenile be processed through a fitness hearing prior to any jurisdictional hearing, because once a juvenile court begins to hear evidence in the jurisdictional hearing the juvenile will be considered placed "in jeopardy", and any subsequent transfer and criminal trial would amount to "double jeopardy".

In keeping with its approach as developed in *Gault, Winship* and *McKiever*, the Court in *Breed* balanced the state's interests against the juvenile's interests in deciding the third issue of the three-prong approach, that is, whether or not the constitutional right will detrimentally impede the beneficial aspects of the juvenile system.

The juvenile's interest, as viewed by the Court, was that of being free from undergoing the trauma, burdens and expense of a second criminal trial on the same charge or charges. The Court labeled the state's interest as that of the availability of a procedure whereby it could transfer an unamenable juvenile to the adult system. In balancing the above interests, it considered the effect its holding might conceivably have upon the juvenile process.[44]

41. *Breed*, 421 U.S. at 530, citing *Winship*, 397 U.S. at 366.
42. *Breed*, 421 U.S. at 530. *See Green*, 355 U.S. at 187.
43. *Breed*, 421 U.S. at 531.
44. *Id.* at 535. It should be noted that in considering these effects, the underlying issue was whether or not the Court's holding that the Fifth Amendment's protection against double jeopardy is applicable to juvenile

The Court considered the situation in which a fitness hearing is held prior to any jurisdictional hearing, but the juvenile judge decides to retain the juvenile within the juvenile system.[45] The effect of such a situation would be that the juvenile judge who heard the fitness hearing would not be allowed to hear the jurisdictional hearing.[46] The state argued that the Court's holding could result in an extra burden upon the juvenile process because more judges would be required to hear jurisdictional hearings when the above situation occurs. In response to this contention, the Court set forth a guideline by stating: ". . . the nature of the evidence considered at a transfer hearing may in some states require that, if transfer is rejected, a different judge preside at the adjudicatory hearing."[47] The Court continued by noting that in some jurisdictions[48] a minor may waive the requirement that a new judge be appointed for the jurisdictional hearing where the juvenile has been retained after a fitness hearing. It indicated that a waiver of the "new judge" requirement was very practical because:

> A juvenile will ordinarily not want to dismiss a judge who has refused to transfer him to a criminal court. There is a risk of having another judge assigned to the case who is not as sympathetic. Moreover, in many cases, a rapport has been established between the judge and the juvenile, and the goal of rehabilitation is well on its way to being met.[49]

In balancing the interests of the juvenile and the state, the Court considered a study[50] dealing with the juvenile court system and recognized that the ". . . juvenile courts, perhaps even more than most courts, suffer from problems created by spiraling caseloads unaccompanied by enlarged resources and manpower."[51] Based on the above study, the Court stated that it would be hesitant to im-

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proceedings would detrimentally impede the juvenile court's unique characteristics of flexibility, individuality and informality due to the resulting requirement of a fitness hearing prior to any jurisdictional hearing.

45. *Id.* at 535-536.

46. The basis for this conclusion derives from *In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970), in which the Supreme Court of California held that a juvenile judge cannot read a probation officer's report prior to a jurisdictional hearing. The result was that if a juvenile judge, in considering the relevant evidence during a detention hearing, reviewed a probation officer's report, a new and different judge would have to be assigned to hear the jurisdictional hearing, unless such requirement was waived by the juvenile.

47. 421 U.S. at 536.

48. *Id.* at 539.

49. *Id.* at 539 n.21.

50. *See* PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-8 (1967) [hereinafter cited as TASK FORCE REPORT].

51. 421 U.S. at 537, citing TASK FORCE REPORT, *supra* note 50.

pose upon the juvenile system any ". . . additional requirements which could so strain [its] resources as to endanger its unique functions."[52] However, it felt that the state's argument regarding additional burdens due to a shortage of judges was neither ". . . 'qualitatively or quantitatively' sufficient to justify a departure . . . from the fundamental prohibition against double jeopardy."[53] The Court concluded that the requirement of having a fitness hearing prior to a jurisdictional hearing may create some "scheduling problems" in those cases in which the judge retains a juvenile within the system; however, this inconvenience would not have any effect upon the juvenile court's unique characteristics of individual treatment, flexibility and informality.

The Court also considered the effect its holding would have in those jurisdictions[54] where a finding of probable cause is required before a transfer to the criminal system is permitted. In such jurisdictions, it is possible that where a fitness hearing is held prior to the jurisdictional hearing and the juvenile is retained within the juvenile process, the result would be duplicative proceedings because the juvenile court would be reconsidering the same evidence.[55] In considering this situation, the Court stated that it had never prescribed any ". . . criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court."[56] The Court held that the only requirement it was placing on the juvenile system by its holding was that:

> [A] state determine whether it wants to treat a juvenile within the juvenile court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain and embarrassment of two such proceedings.[57]

In further support of its reasoning, the Court again referred to various studies which dealt with the juvenile court system. In considering these studies, the Court emphasized the extent to which the protection against double jeopardy had already been made ap-

52. 421 U.S. at 537.
53. *Id.*
54. *Id.* at 536 n.16.
55. *Id.* at 536.
56. *Id.* at 537.
57. *Id.* at 537-538.

plicable to delinquency proceedings in the various states.[58] The Court made reference to a study[59] which indicated that a ". . . large number of jurisdictions . . . presently require that the transfer decision be made prior to an adjudicatory hearing."[60] The study found an absence ". . . of any indication that the juvenile courts in those jurisdictions have not been able to perform their task within that framework."[61] The Court concluded that having a fitness hearing prior to a jurisdictional hearing would have no detrimental effect on the nature of the jurisdictional proceedings.

The Court weighed the effect its holding would have on those who recommend transfer or participate in the process leading to transfer, namely the probation officers. The requirement of having a fitness hearing prior to the jurisdictional hearing would mean that the probation officers would have to complete their investigations and make their recommendations earlier than usual.[62] The Court, in reliance upon certain studies,[63] held that it had ". . . no reason to believe that the resources available to those who recommend transfer or participate in the process leading to transfer decisions are inadequate to enable them to gather information relevant to informed decision prior to an adjudicatory hearing."[64]

The Court, in weighing all of the above effects upon the juvenile system, concluded that the granting of the protection against double jeopardy to juveniles within the juvenile process would not have any substantial detrimental effect on the unique characteristics of the juvenile process.

In summary, the Court found that the purpose for the protection against double jeopardy is to prevent the accused from having to undergo the risk of experiencing the physiological trauma, stress, embarrassment and expense of a criminal trial twice for the same offense, and that the juvenile and the adult experience the same risks and consequences, regardless of the system in which they are

58. *Id.* at 538. *See Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. 266, 275.

59. 421 U.S. at 538 n.19, citing *Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. at 299-300.

60. 421 U.S. at 538.

61. *Id.*

62. A probation officer's recommendations are usually made at the dispositional hearing. *See* CAL. WELF. & INST'NS CODE § 702 (West 1972) which provides that prior to hearing evidence on the proper disposition to be made of the minor, the court ". . . may continue the hearing, if necessary, to receive the social study of the probation officer . . . ."

63. *See Double Jeopardy in Juvenile Proceedings*, 14 WM. & MARY L. REV. at 305-306.

64. 421 U.S. at 539.

prosecuted. In weighing the effects of having a fitness hearing prior to the jurisdictional hearing in order to prevent double jeopardy, the Court considered such matters as judicial scheduling, duplicative proceedings and probation investigations, and found that its holding would not have any substantial detrimental or impeding effects upon the juvenile court system's unique characteristics of individual treatment, confidentiality, flexibility, and informality. The Court held that a juvenile is entitled to the Fifth Amendment's protection against double jeopardy and that such jeopardy will attach when the juvenile court, as the trier of fact, begins to hear evidence. The result is that all fitness hearings must be held prior to any jurisdictional hearing if such jeopardy is to be avoided.

The Court applied its three-prong approach and made the above conclusions, but it continued its opinion by discussing two additional matters, i.e., the concept of continuing jeopardy and a practical aspect of the case which it labeled "the dilemma".

The concept of "continuing jeopardy", relied upon by both the California Court of Appeals[65] and the United States District Court,[66] was espoused by Justice Holmes in his dissenting opinion in *Kempner v. United States*,[67] in which he stated:

> It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once put in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause.[68]

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65. *In re* Gary Steven J., 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971). The Court, in denying the writ of habeas corpus, stated:

> In the situation before us, while it is true that, under the language of Richard M., jeopardy attached once the first witness had testified at the 701 hearing, no *new* jeopardy has arisen by the proceedings sending the case to the criminal court. The entire juvenile court law contemplates a careful determination, on a case-by-case basis, as to the type of procedure most likely to protect society and to rehabilitate the minor. Under some circumstances, a minor will go from the criminal court to the juvenile court; in other cases he will go from the juvenile court to the criminal court. But, until one court or the other reaches a final disposition of the case, only a single jeopardy is involved.

In re Gary Steven J. *supra* at 710, 95 Cal. Rptr. at 189. [Emphasis supplied]

66. *See supra* note 15 and accompanying text.

67. 195 U.S. 100 (1904).

68. *Id.* at 134. The "continuing jeopardy concept", as it relates to the adult criminal system, arises when the state alleges error at trial after the

Even though Holmes is often quoted for the above concept, it was originally developed by the Court in *United States v. Ball*,[69] a case in which the Court refused to accept the view that the Double Jeopardy Clause prevented a second trial when an earlier conviction had been set aside. The Court in *Price v. Georgia*,[70] addressing itself to the *Ball* opinion, stated that because of that opinion, it had ". . . effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course."[71]

The concept, as applied to juveniles, would require the conclusion that once jeopardy attaches in a juvenile proceeding, it continues until such proceedings have run their full course to a final disposition of the case, whether that disposition be in the juvenile system or in the criminal system.[72] The Supreme Court in *Breed* noted that Holmes's view ". . . has never been adopted by the majority of the Court."[73] The Court felt that the state's reasoning, that

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jury has rendered a verdict of "not guilty". According to Holmes's view, the state would be allowed to appeal such errors even though the defendant had been acquitted by the jury. The Court in United States v. Wilson, 420 U.S. 332 (1975), interpreted Holmes's view as follows:

> [I]n his view, the first jeopardy should be treated as continuing until both sides have exhausted their appeals on claimed errors of law, regardless of the possibility that the defendant may be subjected to retrial after a verdict of acquittal.

420 U.S. at 352.

69. 163 U.S. 662 (1896). The Court in *Breed* makes a distinction between the "concept" and the "conclusion" of continuing double jeopardy. The distinction appears to be vital. Under the concept of continuing double jeopardy, according to Holmes's view, the government would be allowed to appeal alleged errors at trial, even though the defendant had been acquitted. The underlying rationale for such an approach appears to be that both sides should be allowed to exhaust their appellate remedies. In contrast, the "conclusion" of continuing double jeopardy, approved by the Court, is that the defendant's jeopardy continues until the defendant is acquitted or his conviction becomes final. *See* U.S. v. Wilson, 420 U.S. 332, 343-44 n.11. Once the defendant is acquitted, the jury's verdict of "not guilty" renders the defendant's jeopardy *final*, and even though there may have been errors at trial, the government is precluded from appeal.

70. 398 U.S. 323 (1970).

71. *Id.* at 326.

72. *See supra* note 66 and 15.

73. 421 U.S. at 534. The Court cites United States v. Jenkins, 420 U.S. 358, at 369 (1975) for its statement, but the reasoning behind such statement appears in United States v. Wilson, 420 U.S. 332, at 352 (1975):

> [W]e have rejected Holmes's continuing jeopardy concept in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the sec-

Jones was never placed in double jeopardy because the proceedings against him had not run their full course within the contemplation of the California Welfare and Institutions Code, was an insufficient explanation for why Jones should be deprived of protection against double jeopardy.[74] It is clear that the concept of continuing jeopardy, as applied to juveniles, is disapproved by the Court.

Before making its final order, the Court addressed itself to one "practical problem" which emphasized the need for the Court's holding. The Court labeled this problem "the dilemma". The dilemma was the ". . . possibility that a juvenile, since he is in the juvenile process, might think he is the 'beneficiary of special consideration' . . . ." and yet ". . . may in fact suffer substantial disadvantages."[75] The Court was referring to the situation in which a juvenile, if uncooperative in a jurisdictional hearing, may suffer an adverse adjudication or, if he is uncooperative with his probation officer, may suffer an unfavorable disposition; yet if a fitness hearing is held *after* the jurisdictional hearing, and the juvenile has been cooperative in the jurisdictional hearing, ". . . he runs the risk of prejudicing his chances in adult court if the transfer is ordered."[76]

An illustration of this dilemma was alluded to by the United States Court of Appeals.[77] In its opinion the Court referred to the situation in which a juvenile is declared a ward of the court in a jurisdictional hearing, but subsequently is processed through a fitness hearing in which he is ordered transferred to the adult criminal system. After such a transfer is ordered, the transcript of the jurisdictional hearing is delivered to the prosecution in the adult criminal system to assist it in prosecuting the juvenile. The Court recognized that such a procedure would give the prosecution in the adult criminal system an unfair advantage in that it would allow the prosecution to review in advance of trial the strong and weak areas of the juvenile's case in addition to his defense. The Court of Appeals found such procedure ". . . offensive to the concepts of

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ond; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal.

74. 421 U.S. at 534.
75. *Id.* at 540.
76. *Id.*
77. Jones v. Breed, 497 F.2d 1160 (9th Cir. 1974).

basic evenhanded fairness."[78]

The Court of Appeals characterized such procedure "offensive", and the Supreme Court in *Breed* found it ". . . at odds with the goal that adjudicatory hearings be informal and non-adversary."[79] The Court stated:

> Knowledge of the risk of transfer after an adjudicatory hearing can only undermine the potential for informality and cooperation which was intended to be the hallmark of the juvenile court system.[80]

The Court concluded that if the jurisdictional hearing were held prior to the fitness hearing, such a procedure would force the juvenile and his counsel into the role of adversary, in that the juvenile would have to protect his interests because of the possibility that he might be transferred to the adult criminal system even after his adjudication.[81] To alleviate this dilemma and to achieve the foundational goal of the juvenile sytem, the Court felt it was necessary to require that a fitness hearing be held prior to any jurisdictional hearing.

Conclusion

The Supreme Court in *Breed v. Jones* held that the protection of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, must be granted to juveniles within the juvenile process in order to assure them "fundamental fairness". The Court found that the purpose underlying the Clause was to prevent the accused from being exposed to the risk of the physiological trauma, stress, embarrassment and expense of a criminal trial twice for the same offense. The Court found that a juvenile within the juvenie process suffers the same anxiety and stress as an adult in the criminal system; therefore, juveniles should be afforded the same protection against double jeopardy as adults.

The effect of granting juveniles protection against double jeopardy will require that the juvenile courts afford juveniles a fitness hearing prior to any jurisdictonal hearing because jeopardy attaches at the moment evidence is first heard during the jurisdictional hearing. Such a requirement will have an effect on the procedures within the juvenile courts; judges who hear a fitness hearing prior to a jurisdictional hearing will not be able to hear the subsequent

78. *Id.* at 1168.
79. 421 U.S. at 540.
80. *Id.* at 540-41.
81. *Id.* at 540.

jurisdictional hearing if the juvenile is retained within the system, unless the "new judge" requirement is waived by the juvenile, and those involved in making recommendations of transfer will be required to make their investigations and recommendations earlier than usual. Regardless of the above, the Court concluded that these effects were not sufficient to deprive a juvenile of his constitutional right to protection against twice being placed in jeopardy because, practically speaking, they have no real impact upon the flexibility, individuality, and informality which characterize the juvenile process.

Breed has articulated adequate guidelines for many of the problems which may result from its holding; but there is one area to which it neglected to direct its attention. The neglected area is that of the California Youth Authority. Section 707 of the California Welfare and Institutions Code provides:

> [A]t any time after such [jurisdictional] hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter . . . .[82]

Sections 780[83] and 1737.1[84] provide, in effect, that if the juvenile

82. Stats. 1961, c. 1616, p. 3485 § 2, *as amended* CAL. WELF. & INST'NS CODE § 707 (West Supp. 1975). For the complete text, *see supra* note 9.

83. *See* CAL. WELF. & INST'NS CODE § 780 (West 1972):
If any person who has been committed to the Youth Authority appears to be an improper person to be received by or retained in any institution or facility under the jurisdiction of the Youth Authority or to be so incorrigible or so incapable of reformation under the discipline of any institution or facility under the jurisdiction of the Youth Authority as to render his retention detrimental to the interests of the Youth Authority, the Youth Authority may return such person to the committing court. However, the return of any person to the committing court does not relieve the Youth Authority of any of its duties or responsibilities under the original commitment, and such commitment continues in full force and effect until it is vacated, modified, or set aside by order of the court.

84. *See* CAL. WELF. & INST'NS CODE § 1737.1 (West 1972):
Whenever any person who has been charged with or convicted of a public offense and committed to the authority appears to the authority, either at the time of his presentation or after having become an inmate of any institution or facility subject to the jurisdiction of the authority, to be an improper person to be retained in any such institution or facility, or to be so incorrigible or so incapable of reformation under the discipline of the authority as to ren-

is an improper person to be received or retained by the Youth Authority, it may return him to the committing court for further disposition. *Breed's* effect upon the above terminology in Section 707 will be to nullify it because the statutory language assumes that the juvenile committed to the Youth Authority has already been processed through a jurisdictional hearing. If the Youth Authority returned the juvenile to the juvenile court under Section 780 or 1737.1 and the Court found the juvenile unfit under Section 707 and ordered him transferred to the adult criminal system for prosecution, such prosecution, according to *Breed*, would amount to double jeopardy.

As to Sections 780 and 1737.1, *Breed* has an indirect effect. The Youth Authority can still return the juvenile to the committing court, but under such circumstances, in light of *Breed*, the committing court can only render an alternative disposition or return the juvenile to the Youth Authority because *Breed* precludes the committing court from transferring the juvenile to the adult criminal system when confronted with the above situation.

One might ask if there are other alternatives available to the Youth Authority when dealing with an unamenable juvenile besides returning him to the committing court. An affirmative answer may be found in Section 1753 of the California Welfare and Institutions Code, which provides:

> For purposes of carrying out its duties, the Authority and the director are authorized to make use of law enforcement, detention, probation, parole, medical, education, *correctional*, segregative and other facilities, institutions and agencies, whether public or private, within the State. The director may enter into agreements with the appropriate public officials for separate care and special treatment

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der his detention detrimental to the interests of the authority and the other persons committed thereto, the authority may return him to the committing court. In the case of a person convicted of a public offense, said court may then commit him to a state prison or sentence him to a county jail as provided by law for punishment of the offense of which he was convicted. The maximum term of imprisonment for a person committed to a state prison under this section shall be a period equal to the maximum term prescribed by the law for the offense of which he was convicted less the period during which he was under the control of the Youth Authority. The Adult Authority may, after seeking the advice of the Youth Authority, allow any such person time credit reductions from his term of confinement according to the table set forth in Section 2920 of the Penal Code for the time during which such person was under the control of the Youth Authority. In the case of a person who has been committed to the authority by a juvenile court, the juvenile court to which he is returned may make such further order or commitment with reference to such person as may be authorized by the juvenile court law, except that said court may not recommit such person to the Youth Authority.

> in existing institutions of persons subject to the control of the Authority.[85] [Emphasis supplied]

In *People v. Scherbing*,[86] the California Court of Appeals held that Section 1753 empowers the Youth Authority to ". . . use all state institutions, including prisons, for any person within its control . . . ."[87] The Court concluded that the Youth Authority has the power to transfer juveniles to *San Quentin*. If the effects of *Breed* bring about this result, it might be arguable that such action would constitute a deprivation of liberty without procedural due process of law in that the juvenile is being treated as an adult criminal, while never receiving the same criminal procedural safeguards afforded to adult criminals, such as the right to a jury trial.

The Court in *Breed* found the lack of double jeopardy "at odds" with the juvenile system's goal of "fundamental fairness". However, if the above hypothetical situation becomes a reality, juveniles will suffer a substantial harm until the courts have the occasion to declare the Youth Authority's action with regard to "correctional" facilities of Section 1753 unconstitutional or the State legislature takes remedial action to alleviate this situation.

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85. CAL. WELF. & INST'NS CODE § 1753 (West 1972).

86. 93 Cal. App. 2d 736, 209 P.2d 796 (1949). In *Scherbing*, the appellant was committed to San Quentin by the Youth Authority under California Welfare and Institutions Code § 1753. The appellant was charged, while in San Quentin, with violating CAL. PENAL CODE § 4502 (West 1949) which provides:

> Every prisoner committed to a State prison who, while at such State prison . . . possesses or carries upon his person . . . any dirk or dagger or sharp instrument, . . . is guilty of a felony and shall be punished by imprisonment in a state prison for a term not less than five (5) years.

The appellant's basic contention was that ". . . he was not lawfully committed to San Quentin, and that only one who has been lawfully committed to a state prison can violate section 4502." *Id.* at 738, 209 P.2d at 798.

87. *Id.* at 740, 209 P.2d at 798. This holding was approved by the California Supreme Court in *In re* Cathey, 55 Cal. 2d 679, 689 n.5, 12 Cal. Rptr. 762, 766 n.5, 361 P.2d 426, 430 n.5 (1961).